

(c) *Violator* means any manufacturer, importer, distributor or retailer or any other legally responsible party who committed a knowing violation of a prohibited act under the CPSA, FHSA, or FFA and is thus subject to penalties.

§ 1119.4 Factors considered in determining civil penalties.

(a) *Statutory Factors.* (1) Section 20(b) of the CPSA, section 5(c)(3) of the FHSA and section 5(e)(2) of the FFA specify factors considered by the Commission in determining the amount of a civil penalty to be sought upon commencing an action for knowing violations of the prohibited acts section of each act. These factors are:

(i) *CPSA (15 U.S.C. 2069(b)).* The nature, circumstances, extent, and gravity of the violation, including:

- (A) The nature of the product defect;
- (B) The severity of the risk of injury;
- (C) The occurrence or absence of injury;
- (D) The number of defective products distributed;
- (E) The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and

(F) Such other factors as appropriate.

(ii) *FHSA (15 U.S.C. 1264(c)(3)).* The nature, circumstances, extent, and gravity of the violation, including:

- (A) The nature of the substance;
- (B) Severity of the risk of injury;
- (C) The occurrence or absence of injury;
- (D) The amount of substance distributed;
- (E) The appropriateness of such penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses; and
- (F) Such other factors as appropriate.

(iii) *FFA (15 U.S.C. 1194(e)(2)).* The nature, circumstances, extent, and gravity of the violations:

- (A) The severity of the risk of injury;
- (B) The occurrence or absence of injury;
- (C) The appropriateness of such penalty in relation to the size of the business of the person charged; and

(D) Such other factors as appropriate.

(2) *The nature, circumstances, extent and gravity of the violation.* Under this factor, the Commission will consider the totality of the circumstances surrounding a violation, including how many provisions of law were violated. The Commission will continue to look at the enumerated statutory factors, as well as other factors (as described in paragraph (b) of this section) that the Commission may determine are appropriate, and consider all of the factors in determining the civil penalty amount.

(3) *Nature of the product defect.* The Commission will consider the nature of the product hazard/substance for which a penalty is sought. A product defect under this factor includes violations for products that contain defects which could create substantial product hazards as referenced in the CPSA and defined and explained in 16 CFR 1115.4; regulatory violations of a rule, regulation, standard or ban; or product hazards presented by any other violation of the prohibited acts of section 19 of the CPSA.

(4) *Severity of the risk of injury.* Consistent with its discussion of severity of the risk at 16 CFR 1115.12, the Commission will consider, among other factors, the potential for serious injury or death (and whether any injury required actual medical treatment including hospitalization or surgery); the likelihood of injury; the intended or reasonably foreseeable use or misuse of the product; and the population at risk (including vulnerable populations such as children, the elderly, or those with disabilities).

(5) *The occurrence or absence of injury.* The Commission will consider whether injuries have or have not occurred with respect to any product associated with the violation.

(6) *The number of defective products distributed.* The Commission will consider the actual number of products or amount of substances imported or placed in the stream of commerce to distributors, retailers, and consumers.

(7) *The appropriateness of such penalty in relation to the size of the business of the person charged including how to mitigate undue adverse economic impacts on*

small businesses. (i) The Commission is required to consider the size of a business in relation to the amount of the proposed penalty. This factor reflects the relationship between the size of the business of the person charged and the deterrent effect of civil penalties. In considering business “size,” the Commission may look to several factors including the firm’s number of employees, net worth, and annual sales. The Commission may be guided, where appropriate, by any relevant financial factors to help determine a violator’s ability to pay a proposed penalty including: liquidity factors; solvency factors; and profitability factors.

(ii) The statute requires the Commission to consider how to mitigate the adverse economic impacts on small business violators *only* if those impacts would be “*undue*.” What the Commission considers to be “undue” will vary based upon the violator’s business size and financial condition as well as the nature, circumstances, extent and gravity of the violation(s). When considering how to mitigate undue adverse economic consequences, the Commission may also follow its Small Business Enforcement Policy set forth at 16 CFR 1020.5.

(b) *Other factors as appropriate.* In determining the amount of any civil penalty to be pursued when a knowing violation of the prohibited acts section of the CPSA, FHSA, or FFA has occurred, the Commission may consider, where appropriate, other factors in addition to those listed in the statutes. Both the Commission and the violator are free to raise any other factors they believe are relevant in determining an appropriate penalty amount. Which, if any, additional factors the Commission considers in determining an appropriate penalty amount, including but not limited to those listed above, will be unique to each case. In all civil penalty matters, any additional factors beyond those enumerated in the statute that the Commission takes into consideration for purposes of determining an appropriate civil penalty amount will be made known to and discussed with the violator. Additional factors which may be considered in an individual case include, but are not limited to, the following:

(1) *Safety/Compliance Program and/or System:* The Commission may consider, for example, whether a violator had at the time of the violation, a reasonable program/or system for collecting and analyzing information related to safety issues, including incident reports, lawsuits, warranty claims, and safety-related issues related to repairs or returns; and whether a violator conducted adequate and relevant pre-market and production testing of the product(s) at issue.

(2) *History of noncompliance:* The Commission may consider if the violator has a history of noncompliance with the CPSC and whether a higher penalty should be assessed for repeated non-compliance.

(3) *Economic Gain from Noncompliance:* The Commission may consider whether a firm benefitted economically from a delay in complying with statutory and regulatory requirements.

(4) *Failure of the violator to respond in a timely and complete fashion to the Commission’s requests for information or remedial action:* The Commission may consider whether a violator’s failure to respond in a timely and complete fashion to requests from the Commission for information or for remedial action should increase the amount of the penalty.

§ 1119.5 Enforcement notification.

A potential violator will be informed in writing that the Commission believes it is subject to a possible civil penalty. The violator will be able to submit evidence and arguments that it is not subject to such a penalty.

PART 1130—REQUIREMENTS FOR CONSUMER REGISTRATION OF DURABLE INFANT OR TODDLER PRODUCTS (Eff. June 28, 2010)

EFFECTIVE DATE NOTE: At 74 FR 68676, Dec. 29, 2009, part 1130 was added, effective June 28, 2010.

Sec.

1130.1 Purpose, scope and effective date.

1130.2 Definitions.

1130.3 General requirements.

1130.4 Identification on the product.

1130.5 Requirements for registration form.

1130.6 Requirements for format of registration form.